Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

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Respondent.

MOTION TO DISMISS THE WRIT ON ACCOUNT OF MOOTNESS

Respondent, Pascual Guana-Sanchez, by his attorneys, Joseph Beeler and Donald J. Martin, respectfully suggests to this Court the probability of mootness of this cause and respectfully moves to dismiss the writ of *certiorari* or, in the alternative, to remand the case to the District Court for factfinding and the granting of appropriate relief. In support of his motion Respondent states as follows:

1. The respondent-defendant was arrested in November of 1971 in the company of three other persons.

The indictment, which was not returned until three months later, alleges that the three persons who were being transported by the defendant were unlawfully entered aliens.

2. On February 28, 1972, Joseph Beeler was appointed to represent the defendant. A motion to suppress evidence was filed on March 17, 1972. On March 27, 1972, the Court (the Honorable James B. Parsons, Judge Presiding) set the date of April 17, 1972, for a hearing on defendant's motion, which date was subsequently reset on the government's motion to May 12, 1972. On that date the hearing was held and on June 8, 1972, the District Court granted the defendant's motion to suppress evidence.

3. The government on June 23, 1972, filed its notice of appeal pursuant to 18 U.S.C. §3731 which provides that such interlocutory criminal appeals ". . .shall be diligently prosecuted", but its brief on appeal was not filed until October 20, 1972. The government also requested and received an extension of time to file its reply brief. The case was argued before the Court of Appeals on January 23, 1973 and decided July 18, 1973. No stay of mandate was sought by the government and the mandate issued. The government requested and received an additional 30 days extension of time to file its petition for rehearing and the rehearing was denied on September 25, 1973. Following another extension of time, the government's petition for a writ of certiorari was filed on or about November 23, 1973. Respondent's Memorandum in Opposition, at 13-14, pointed out the delay and the defendant's previous assertion of his speedy trial rights. On June 17, 1974 this Court granted the petition. On August 13, 1974 the government filed an untimely brief on the

merits as petitioner. The brief on the merits for defendant as respondent is currently due October 16, 1974.

4. Meanwhile, somewhat after he had been appointed, Mr. Beeler had made a request of Mr. Michael D. Stevenson, the Assistant United States Attorney assigned to the case, for information as to the whereabouts of the three alleged aliens or for permission to interview them. Mr. Stevenson declined this request and stated that they could be examined at trial. Afterwards, on October 31, 1972, the defendant served and filed a document formally asserting his right to a speedy trial and objecting to any further continuances in this case. At numerous status calls in the District Court counsel urged that the case be set for trial but the Court expressed its belief that it had no jurisdiction while the case was on appeal.

5. Finally, on or about August 23, 1974, newly assigned District Court counsel (Mr. Beeler having left the staff of the Federal Defender Program of Chicago) appeared in Judge Parsons' absence before the Northern District of Illinois emergency judge (The Honorable Prentice Marshall) and presented a Motion to Produce Witnesses, a copy of which is attached hereto as Exhibit A.[1] Said motion pointed out that the mandate had issued, and asserted that "[i]t is essential to proper pretrial preparation that access be had to the [three aliens] for the purpose of interviewing, but the defendant has no information as to their whereabouts." Expressing the view that the matter was not of an

[1] Exhibits A through E were attached, so labeled, to a later Motion to Dismiss the Indictment. A copy of that Motion and its exhibits is attached hereto to Group Exhibit I.

emergency nature, Judge Marshall continued the motion for hearing before Judge Parsons on September 12, 1974.

6. The day immediately following the appearance before the emergency judge, the government filed in the Court of Appeals a motion to recall the mandate stating a single ground for the motion: "to preclude further proceedings in the district court." On August 30, 1974, the Court of Appeals granted the government's motion and recalled the mandate. A copy of said Order is attached hereto as Exhibit B.

7. On September 12, 1974, when the defendant's motion to produce witnesses was presented to Judge Parsons, the action of the Court of Appeals was argued by the prosecutor (Mr. Stevenson) to have deprived the District Court of jurisdiction to entertain the motion. At that September 12 appearance the prosecutor also declined to state whether or not the three alleged aliens in this case were presently within the continental limits of the United States or were without and beyond the reach of the subpoena power of the Court and the parties. The Court did not reach the question of its jurisdiction but nonetheless denied the defendant's motion.

8. Subsequently defendant served and filed (1) a Motion to Dismiss Indictment and supporting memorandum and (2) a Motion of Defendant for Discovery or, Alternatively, For Immediate Trial and on September 18, 1974, appeared before Judge Parsons on the motions. The Motion to Dismiss Indictment, a copy of which is attached thereto as Group Exhibit 1,[2] stated these reasons:

[2]The attachments to the Motion to Dismiss Indictment as it was filed in the District Court remain designated as originally labeled, i.e., as Exhibits A through E.

> "...(1) the three aliens named in the indictment, whose presence is constitutionally required for the trial of this cause, have been removed from the United States by the plaintiff or have been allowed to depart voluntarily, in violation of the rights of due process of law, to confront witnesses, and to compulsory process as guaranteed by the Fifth and Sixth Amendments to the United States Constitution; and (2) the inordinate delay from the time of the defendant's arrest in 1971, caused principally by the government's actions, and in the face of the defendant's demand for trial in October of 1972, is in violation of the right to a speedy trial as embodied in the spirit and the letter of this district's Plan to Implement Rule 50(b), Rule 48(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment."

Among the grounds asserted in support were the government's efforts to prevent the interviewing of witnesses or even inquiry as to the probability of mootness and the demonstrable hardship which the pendency of this criminal prosecution has imposed upon defendant and his family. The Memorandum in Support of Defendant's Motion to Dismiss Indictment, a copy of which is attached hereto as Exhibit II, elaborates the legal basis for the requested relief citing *United States v. Cox*, 475 F.2d 837 (9th Cir. 1973) and *United States v. Clay*, 481 F.2d 133, 137 (7th Cir. 1973) in support of the speedy trial point and *United States v. Mendez-Rodriquez*, 450 F2d 1 (9th Cir. 1971), *inter alia*, in support of the witness point. The Motion of Defendant for Discovery or, Alternatively, for Immediate Trial, a copy of which is attached hereto as Exhibit III, seeks a variety of information about the aliens and their present whereabouts including: "7.

What information exists to support the belief that said aliens are now subject to the process of this Court, to extradition for purposes of testimony at the trial of this cause, or that their presence at trial otherwise can be assured." The stated purpose of the discovery motion was to illuminate the issues in defendant's Motion to Dismiss Indictment and to prove the mootness of this cause, citing *Walling v. James v. Reuter, Inc.*, 321 U.S. 671, 677 (1944) and *Mills v. Green*, 159 U.S. 651 (1895) as examples of mootness. The prosecutor (Mr. Stevenson) opposed both motions on grounds that the mandate had been recalled and asked the District Court to deny the defendant the right to file the motions. The Court, however, permitted filing of the motions but then denied the motions, remarking in the process:

> "THE COURT: Mr. Decker [the defense counsel], I have had a chance to review your motion. I might indicate that you argue very well, with a degree of brilliance, and I think you owe it to your client to at least make a record. We operate upon what I find to be a tradition, not upon a rule, that when the matter is before the Appellate Court or before the Supreme Court that the district court will take no action in it whatsoever.
>
> "Now, what your motion does is attack really that tradition and I think that you should have a right to make your record on it."

A copy of the Court's minute order denying the motions is attached hereto as Exhibit IV.

9. Defendant-respondent asserts upon information and belief that the three alien witnesses whose testimony the District Court has suppressed, have been allowed by the government to melt back into the populace of Mexico, that, if their whereabouts were

known, these witnesses nonetheless would be beyond the subpoena power of the Court and would not be subject to any treaty of extradition. See *United States v. Mendez-Rodriquez*, 450 F.2d 1 (9th Cir. 1971). In other words, the question before this Court–the correctness of the District Court's suppression decision –has become hypothetical; there is no real case or controversy. Defendant further asserts that the government's behavior below confirms this contention. Mr. Justice Rehnquist has recently reminded us that "we may not as judges [or lawyers] ignore what we know as men, . . ." *United States v. Maze*, ____ U.S. ____ , 94 S.Ct. 645, 650 n.7 (1974). We regard it as too plain for further comment that the three aliens are no longer subject to United States jurisdiction and/or compulsory process; that the government's recent action in the Court of Appeals was designed to frustrate any inquiry as to mootness; and that the same is true of the prosecutor's refusals on September 12 and September 18 to disclose facts in the District Court regarding the three aliens.

10. The foregoing demonstrates that this case is moot, or, in the alternative, that the plaintiff is at least called upon to answer the allegation of mootness lest the Court render an opinion where there is no case or controversy. Defendant respectfully suggests that the appropriate procedure is either to dismiss the writ for mootness or to remand to the District Court where the plaintiff may answer and appropriate factfinding can be conducted. See *DeMarco v. United States*, ____ U.S. ____ , 94 S.Ct. 1185, 39 L.Ed2d 501 (1974) (footnote).

11. More importantly to defendant, the foregoing also demonstrates that he has been denied a speedy trial

and basic rights of trial preparation. The "tradition" against taking action while cases are on interlocutory review evidently tying the hands of the District Court, *contra United States v. Cox*, 475 F.2d 837 (9th Cir. 1973), leaves the defendant with no present recourse. Defendant therefore urges that the remand order also enable the District Court to hear defendant's several other motions for relief.

Respectfully submitted.

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750 N.E. 61st Street
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(305) 751-3808

Attorney for Respondent

DONALD J. MARTIN
One Montgomery Plaza
Swede and Airy Streets
Norristown, Pennsylvania 19401
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October 11, 1974.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION TO DISMISS INDICTMENT

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker, and Federal Defender Program, moves to dismiss the indictment for the reasons that (1) the three aliens named in the indictment, whose presence is constitutionally required for the trial of this cause, have been removed from the United States by the plaintiff or have been allowed to depart voluntarily, in violation of the rights to due process of law, to confront witnesses, and to compulsory process, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution; and (2) the inordinate delay from the time of the defendant's arrest in 1971, caused principally by the government's actions, and in the face of the defendant's demand for trial in October of 1972, is in violation of

the right to a speedy trial as embodied in the spirit and the letter of this district's Plan to Implement Rule 50(b), Rule 48(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment. In support of his motion the defendant states as follows:

1. The defendant was arrested in November of 1971 in the company of three other persons. The indictment, which was not returned until three months later, alleges that the three persons were aliens who were being unlawfully transported by the defendant.

2. On or about February 28, 1972, Joseph Beeler was appointed to represent the defendant in this cause. As the undersigned attorney is informed and believes, shortly thereafter Mr. Beeler made a request of Mr. Stevenson, an Assistant United States Attorney, for information as to the whereabouts of the three alleged aliens or for permission to interview them. Mr. Stevenson declined this request.

3. On June 8, 1972, this Court granted the defendant's motion to suppress evidence. While the government filed its notice of appeal on June 23, 1972, its brief on appeal was not filed until October 20, 1972. Thereafter, on or about October 31, 1972, the defendant asserted his right to a speedy trial and objected to any further continuance in the case.

4. The case is now pending before the Supreme Court on the grant of the government's Petition for a Writ of Certiorari.

5. The undersigned attorney was assigned to the case on August 15, 1974, Mr. Beeler having left the office of the Federal Defender Program. On or about August 23, 1974, in the absence of this Court, the undersigned attorney appeared before the emergency judge, Judge

Marshall, and presented the motion 'to produce witnesses that is attached hereto as Exhibit A. Expressing the view that the matter was not of an emergency nature, Judge Marshall continued the motion for hearing before this Court on September 12, 1974.

6. The court appearance on August 23rd was the seventh time, according to the docket sheet, that the parties had appeared after the court's ruling suppressing the evidence, the other occasions having been on October 17, 1973, October 31, 1973, December 21, 1973, March 20, 1974, May 20, 1974, and June 28, 1974. On none of these occasions was objection made to the power of this Court over the cause, as the undersigned attorney had been informed and believes.

7. The day following the appearance of the undersigned attorney before Judge Marshall, the government filed in the Court of Appeals a motion to recall the mandate, stating a single ground for the motion, which was "to preclude further proceedings in the district court."

8. On August 30, 1974, the Court of Appeals granted the government's motion and recalled the mandate. A copy of said Order is attached hereto as Exhibit B.

9. On September 12, 1974, when the defendant's motion to produce witnesses was presented to this Court, the action of the Court of Appeals was argued by the prosecutor to have deprived the Court of jurisdiction to entertain the motion. This Court did not reach that issue, but nonetheless denied the defendant's motion.

10. To the contrary, this Court retains jurisdiction to enter such orders as justice may require despite the pendency of the government's appeal.

11. At the appearance on September 12, 1974, the prosecutor declined to state whether or not the three alleged aliens in this cause were presently within the continental limits of the United States, or were without the reach of the subpoena power of the Court and the parties.

12. Mr. Justice Rehnquist has recently reminded us that "we may not as judges [or lawyers] ignore what we know as men, . . ." *United States v. Maze*, 94 S. Ct. 645, 650 n.7 (1974). We regard it as too plain for further comment that the three aliens are no longer subject to the court's jurisdiction and/or subpoena power; that the government's recent action in the Court of Appeals was designed to render more difficult the presentation to this Court of the question of whether the case has become moot; and that the same is true of the prosecutor's refusal to address the issue in this Court on September 12th.

13. It is the duty of attorneys for parties in litigation to advise the court if and when a case becomes moot. It is respectfully suggested that it is likewise the duty of the Court to take action when, as here, a case or controversy is no longer presented because of mootness.

14. The only forum in which action presently may be taken to develop the facts in regard to mootness is this Court. Absent on affirmative response by an government to this motion, moreover, it is respectfully suggested that the defendant's contentions must be accepted as accurate.

15. The foregoing circumstances, it is submitted, bear directly on the Court's exercise of discretion in ruling on the additional motion of the defendant, which

is to dismiss the indictment because of the delay herein. While it is recognized that not all the delay has occurred herein is the responsibility of the prosecutor–the government's Petition for a Writ of Certiorari, for example, remained pending for a number of months–the defendant is responsible for none of the delay and asserted his right to a speedy trial nearly two years ago. Should the opinions of this Court and the Seventh Circuit not be upheld by the Supreme Court, a period of more than three years is likely to have elapsed between the time of the defendant's arrest and his trial.

16. It is our position that a dismissal order should now be entered, first, under the Plan of this district in Implementation of Rule 50(b) of the Federal Rules of Criminal Procedure attached hereto as Exhibit C. The Plan provides generally that trials of defendants not in custody shall commence within 180 days after a plea of not guilty. Par. 2(b). Discretion is vested in the Court, however, to permit extensions of this time limit, but "only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial." *Id.*, par. 4. The same paragraph specifically mentions that the court may take into consideration a reasonable period of delay for interlocutory appeals.

17. The reasons that overlooking the time limits under the Plan would not serve "the interest of justice" are those which also establish congnizable injury to the defendant as the result of the delay herein, and are set forth in the affidavits of the defendant and his wife, attached hereto as Exhibits D and E. In brief, they show:

a. The anxiety attendant to the pendency of these felony charges is not confined to the defendant alone; his wife and nine children are also aware of the charges. This knowledge, and their loyalty to and affection for the defendant, have produced illness, basic negative changes in career plans, and negative attitudes toward the criminal justice system.

b. In the opinion of the undersigned attorney, who was assigned last month to the case for the first time, the defendant's memory of the events of November, 1971, is no longer adequate to allow adequate preparation for trial or an effective trial presentation of a defense;

c. The defendant's immediate supervisor at the company for which he has worked at all pertinent times is aware of the pendendy of these felony charges, thus affecting to an unascertainable degree the defendant's opportunities for continued employment and advancement.

18. Considering all the circumstances, the delay herein cannot be regarded as reasonable.

19. Rule 48(b) of the Federal Rules of Criminal Procedure provides an independent ground for dismissal for violation of the defendant's speedy trial rights. As in the case of the district Plan, a decision under Rule 48(b) may take into account factors that are not necessarily germane to a decision whether the Sixth Amendment right to a speedy trial has also been violated.

20. The passage of time here, we submit, also establishes a violation of the constitutional right to a speedy trial.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
vs.	)	NO. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION TO PRODUCE WITNESSES

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker and Federal Defender Program, moves the Court to order the production for purposes of interview of the following persons: Juan Mata-Zapata, Agustin Olivares-Hernandez, and David Perez-Gutierrez. In support of his motion the defendant states as follows:

1. The defendant is charged with the unlawful transportation of aliens.

2. The defendant made a formal demand for a speedy trial nearly two years ago.

3. The indictment herein identifies the above-named persons as aliens who were unlawfully transported by the defendant in 1971. They are thus uniquely within the control of the United States.

4. Following the affirmance by the Court of

Appeals, 484 F.2d 590 (7th Cir. 1973), of Judge Parson's ruling (granting the defendant's motion to suppress witness testimony), no stay of mandate was sought by the government, and the mandate issued. While certiorari was granted, it is therefore likely that a trial may be scheduled in the near future.

5. The undersigned attorney was assigned to this cause on August 15, 1974, the former attorney for the defendant having left the office of the Federal Defender Program, and is ignorant of the circumstances underlying the charges.

6. It is essential to proper pretrial preparation that access be had to the above-named persons for the purpose of interviewing, but the defendant has no information as to their whereabouts.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

EXHIBIT B
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 30, 1974

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	)	
	)	Appeal from the
	)	United States Dis-
No. 72-1784 vs.	)	trict Court for the
	)	Northern District
PASCUAL GUANA-SANCHEZ, *Defendant-Appellee.*	)	of Illinois, Eastern
	)	Divsn.
		No. 72 CR 50

This matter comes before the Court on the Government's motion to recall mandate pending disposition by Supreme Court and defendant-appellee's answer to government's motion to recall mandate. On consideration whereof,

IT IS ORDERED that in light of the United States Supreme Court's granting of certiorari on June 19, 1974, that the government's said motion be, and the same is hereby, GRANTED.

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PLAN TO IMPLEMENT RULE 50(b)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the Northern District of Illinois have adopted the following Plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. Priorities in Scheduling Criminal Cases.

(a) Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure.

(b) The trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

(c) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting.

2. Time Requirements.

Subject to the provisions of section 4 hereof, the judges of this Court will observe the following time limits, which are deemed to be maximum time limits:

(a) Arraignments. If a defendant is prosecuted on an information or an indictment, he shall be arraigned

and enter a plea within 20 days if in custody, or within 30 days if not in custody, calculated from the date of the filing of the information or the return of the indictment or from the date of arrest, whichever is the later. The provisions of section 3 pertaining to pretrial discovery and inspection shall be considered in connection with the implementation of this section.

(b) Trial. The trial shall commence within 90 days after a plea of not guilty, if the defendant is held in custody, or within 180 days if he is not in custody.

(c) Sentencing. A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.

(d) Where a defendant is apprehended outside of this district, the time set out above shall begin to run when the defendant is returned to this district.

(e) The implementation of other sections of this Plan will in most cases dispose of a criminal case in substantially less time than the maximums herein set forth.

3. Pretrial Discovery and Inspection.

(a) Within five (5) days after the arraignment the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

(1) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports

of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(5) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record;

(6) Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant.

(b) If, in the judgment of the United States Attorney, it would not be in the interest of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant's counsel, disclosure may be declined. A declination of any request disclosure shall be in writing, directed to defendant's counsel, and signed personally by the United States Attorney or the First Assistant United States Attorney, and shall specify the types of disclosures that are declined. If the defendant seeks to challenge the declination he shall proceed pursuant to subsection (c) below.

(c) Additional discovery or inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United States Attorney within ten (10) days of the arraignment (or such later time as may be set by the Court for the filing of pretrial motions) with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner.

(d) In the event defendant thereafter moves for additional discovery or inspection, his motion shall be filed within the time set by the Court for the filing of pretrial motions. It shall contain:

(1) The statement that the prescribed conference was held;

(2) the date of said conference;

(3) the name of the Assistant United States Attorney with whom conference was held; and

(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

(e) Any duty of disclosure and discovery set forth in this Plan is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Plan of material within the purview of Rules 16(a)(2) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

4. Extension of Time Limits.

Any period of time prescribed by this Plan may be extended by the Court. The Court shall grant such

extensions only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial. Among other reasons, the Court may take into consideration: a reasonable period of delay resulting from other proceedings concerning the defendant, including, but not limited to, proceedings for the determination of competency and the period during which he is incompetent to stand trial, extraordinary pretrial motions, stays, interlocutory appeals, trial of other charges, the period of delay resulting from continuances granted by the Court for persuasive reasons, and the period during which such matters are under consideration.

5. Effect of Noncompliance with Time Limits.

Upon the expiration of a time limit, as prescribed by or extended under this Plan, a defendant who is in custody shall be released from custody upon such bail or conditions of release as he can meet unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. §3146, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution.

6. Definition of "Custody".

As used in this Plan, "custody" means physical detention on the federal charge contained in the pertinent complaint, information, or indictment.

7. Procedures Intended to Facilitate Prompt Disposition of Cases.

(a) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the Court's criminal docket.

(b) The Court or the Magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel, his arraignment may be postponed not more than one week to permit him to obtain or to consult with counsel. When appropriate, the Court may cause a plea of not guilty to be entered for the defendant. The Court shall take adequate steps to ensure that defendants are represented by counsel.

(c) A trial date shall be set at the time of arraignment or at the earliest practicable time thereafter.

(d) Except for good cause shown, the Court may not extend the time for motions under F.R.Crim.P. 12(b)(3) beyond 10 days after plea. Such motions will be ruled upon promptly, so that the trial need not be delayed.

(e) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

8. Retrials.

If the defendant is to be tried or retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when

the order occasioning the trial or retrial becomes final and the case has been reassigned pursuant to the provisions of Circuit Rule 23.

9. Review of Defendants in Custody and Delinquent Cases.

The United States Attorney shall within 5 days after the close of the reporting period furnish the Court with a copy of a biweekly report of persons in custody, on which shall be indicated by court number the judge to whose court such person has been assigned. A copy of such report shall be furnished each judge of the Court.

10. Responsibility of United States Attorney.

(a) The Court has primary responsibility for setting and calling cases for trial. A conflict in schedules of Assistant United States Attorneys will not be ground for a continuance or delayed setting except under unusual circumstances approved by the Court and called to the Court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases.

(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

(1) to undertake to obtain the presence of the prisoner for plea and trial; or

(2) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this Plan.

11. Effective Date of Plan.

This Plan shall become effective upon approval of the reviewing panel designated in accordance with Federal Rule of Criminal Procedure 50(b) and shall apply to all criminal proceedings begun after this Plan shall have become effective.

"Criminal proceedings begun" means by arrest, return of indictment, or filing of information, whichever occurs first.

Approved January 30, 1973.

EXHIBIT D

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

PASCUAL GUANA-SANCHEZ, being first duly sworn, on oath deposes and states as follows:

1. I am the defendant in Case No. 72 CR 50, United States District Court, Northern District of Illinois.

2. I was arrested in 1971 in this case, at which time I was working at the job I still hold. I told the plant superintendent that I had been arrested and charged with a federal crime.

3. My memory of the events surrounding my arrest is presently not good. I believe the arrest occurred in Villa Park, though I am not sure. I do not recall the

names of the officers who arrested me, the names of the persons who were with me at the time, or other events in that period of time.

/s/ Pascual Sanchez
Pascual Sanchez

SUBSCRIBED AND SWORN TO BEFORE ME
this seventeenth day of September, 1974.

/s/ (illegible)
(illegible)
Notary Public

EXHIBIT E

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

JULIA GUANA-SANCHEZ, being first duly sworn, on oath deposes and states as follows:

1. I am the wife of Pascual Guana-Sanchez. We have been married 22 years and have nine children.

2. During the period of our marriage I have never known my husband to have been in trouble with the authorities other than the case brought in the federal court in Chicago. He has always worked regularly, does

not use liquor, and has the respect and love of his family. He spends almost all his free time with the children.

3. After his arrest in November of 1971, I became nervous and anxious to the point that my doctor prescribed tranquillizers which I am still taking every day.

4. Each of our children is aware of the fact that his father was arrested. Each holds him in high regard and is afraid of what may happen. The children speak to me about the case often and have said they would like to go to jail with him if he is sent.

5. Since 1971 I have observed the following about my children that I think are the result of knowledge of their father's arrest and the possibility that he will be jailed:

a. My 21-year-old son has abandoned his plans to become a police officer. He has become cynical about the police system and the damage he has seen to family members as the result of the delay in finishing the case.

b. My 18-year-old son has long planned to go to college and then become a doctor. He has said, however, that he fears something may happen to his father in this case and that he would instead work to help the family if necessary.

c. My 15-year-old daughter was not a nervous child. Beginning about a year ago, however, she began having stomach pains and fainting spells. She has been examined by four doctors since then and they have told me they can find nothing wrong with her physically. In particular, she has become visibly ill when she has heard that her father is to go to court.

d. After my 12-year-old son heard of his father's arrest, he became hysterical or visibly shaken on a number of occasions, and began biting his fingernails. fingernails.

e. My 19-year-old daughter, who is now married, planned to go to college to study art. After her father's arrest, she quit high school.

f. Since my husband's arrest, none of our children's grades in school have gone up. Their grades have generally suffered.

/s/ Mrs. Julia Sanchez
Mrs. Julia Sanchez

SUBSCRIBED AND SWORN TO BEFORE ME
this seventeenth day of September, 1974.

/s/ (illegible)
(illegible)
Notary Public

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 CR 50
	)	
PASCUAL GUANA-SANCHEZ	)	

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS INDICTMENT.**

Jurisdiction; Speedy Trial

The defendant's motion detials the unusual and prejudicial delay in this cause. The single most striking elements of this delay are the four-month period it took the government to file its Brief in the Court of Appeals after this Court's opinion suppressing evidence, the fact, of which this Court may take notice, that the government's Brief was only filed in the Supreme Court a matter of weeks ago, and the familial damage (detailed in the affidavits of Mr. and Mrs. Guana-Sanchez) wrought by the protracted proceedings herein. In brief, as to the latter, what may appear to the government to be a routine alien case has caused incalculable injury already.

Recently, under facts less impressive than those here, the Ninth Circuit approved a trial court's dismissal of

an indictment during the pendency of the government's appeal from an order suppressing evidence. *United States v. Cox*, 475 F.2d 837 (1973). The basis for the dismissal was the trial court's view that the defendant's speedy trial rights under the Sixth Amendment had been jeopardized. *Id.* at 841. While the exact chronology of events is not detailed in the appellate opinion, it is clear that the delay that prompted the dismissal was that on appeal; there was no suggestion that the suppression hearing was not conducted promptly, and there was no pre-arrest delay. (The defendant was arrested on February 7, 1972, and indicted nine days later; the opinion of the Court of Appeals issued on March 12, 1973.)

The *Cox* opinion, of course, also answers the government's claim, advanced at the hearing last week, that this Court lacks jurisdiction by reason of appellate activity in the case.

Compared with *Cox*, in which the appellate decision issued a year after the defendant's arrest, the delay herein—now approaching three years—is excessive. We believe a constitutional violation is made out. If not, the case fits within the Seventh Circuit's statement of the reach of Rule 48(b), Fed. R. Crim. P., in *United States v. Clay*, 481 F.2d 133, 137 (7th Cir. 1973):

> "If cases are completely inactive for prolonged periods, or perhaps simply too old to be kept on an active calendar, a court surely has power to enter an order of dismissal for want of prosecution even though neither litigant has been prejudiced by the delay. Moreover, the court may properly threaten to enter such an order as a means of requiring litigants to pursue their matters to an expeditious conclusion. . . ."

Or the Court properly may enforce the judgment of the Plan to Implement Rule 50(b) (Exhibit C to defendant's Motion to Dismiss). The Plan requires a finding, impossible here we submit, that "the interest of justice" would be served if delays of more than six months are to be countenanced.

Were there a question about the view that should be taken of the three-year passage of time herein, we submit it is dispelled by the additional circumstances shown in the affidavits of the defendant and his wife that accompany his motion. A family man, the defendant must contend daily with the knowledge that his wife and nine children are aware that he is an accused felon and have been affected. Having worked at the same job for some time, the defendant is also subject to the effect on his employment prospects, as well as advancements, that his employer's knowledge of the charges will have. He has sworn also to a flagging memory about the event of November, 1971, a hardly unusual turn of events.

The Court should also consider what the passage of time means in terms of the credibility of the government's witnesses. It is alleged in the indictment that they are aliens, from Spanish-speaking countries most likely. If they have returned to their cultures, what effect has the delay had on their recollections? And what is likely to be the effect on their testimony if, as seems to be the case, their voluntary return can be obtained only by inducements of one sort or another?

Weighed against these considerations, it is submitted, the government's lackadaisical appreciation of the defendant's rights warrants this Court's response.

Rights to Due Process, to Compulsory Process, and to Confrontation of Witnesses

We have detailed in our motion that the sole witnesses against the defendants, the very aliens he is alleged to have transported, were made unavilable to the defense and are now presumably out of the country. We contend, taking into account also the practical ineffectiveness of any future effort to evaluate before or at trial the worth of what the alien-witnesses might say, that the indictment must be dismissed.

The proposition is well established that a defendant has a right to unimpeded access to witnesses before and at trial. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. White*, 454 F.2d 435, 438 (7th Cir. 1971), *cert. denied*, 406 U.S. 962, (1972), and authorities cited therein. Thus, when, as here, the claim was made that the government had control of witnesses and obstructed defense access to them, the Seventh Circuit cited *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), in stating: "We wish to make it clear that witnesses are the special property of neither party and in the absence of compelling reasons, *the district court should facilitate access to them before trial whenever it is requested. . . .*" *United States v. Vole*, 435 F.2d 774, 778 (1970) (dictum; emphasis added).

The rule has particular force in cases alleging dealings with illegal aliens, as the latter are typically incarcerated and unavailable to the defense. Having sought and been denied information about the witnesses against Guana-

Sanchez, the defense was further thwarted by the apparent removal of the witnesses from the country. Directly on point is *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). There the defendant had also been charged with illegal transporation (sic) of aliens. The government returned to Mexico three of the six aliens involved before defense counsel had the opportunity to interview them. The defendant moved for dismissal of the indictment on the grounds that the government had, by the return of the aliens, violated his fifth and sixth amendment rights to due process of law and access to witnesses. Defendant's motion was denied, and he was later convicted at trial. Defendant appealed only the denial of his dismissal motion. The Ninth Circuit reversed the conviction because the government had, by its acts, deprived the accused of basic constitutional rights, saying:

> "We decline to indulge in any speculation that the interviews [of the deported witnesses] would, or would not, have been fruitful to the defense." *Id.* at 5.

We consider that the interests to which the prosecutor alluded at the hearing last week–the mandate hastily was recalled to the Court of Appeals; the Supreme Court has accepted certiorari so that an academic issue may be resolved–are trifling in comparison with the wrongs already inflicted on the defendant and his family, to say nothing of the concept

of speedy and equal justice. We ask the Court to rectify these wrongs in the only way possible, by dismissing the indictment.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 72 Cr 50
	)	
	)	
PASCUAL GUANA-SANCHEZ	)	

MOTION OF DEFENDANT FOR DISCOVERY OR, ALTERNATIVELY, FOR IMMEDIATE TRIAL

The defendant, PASCUAL GUANA-SANCHEZ, by his attorneys Thomas D. Decker, and Federal Defender Program, pursuant to Rules 7(f) and 16(b), moves the Court to order forthwith production by the plaintiff of the following information.

1. When was the last contact had by the government and its agents with each of the three alleged aliens named in the indictment;

2. When, if at any time, and where were said aliens in the custody of the United States during and after November of 1971;

3. Were said aliens charged with the commission of any federal crimes, or violations of any other statutes or regulations? If so, describe;

4. What information is available concerning the present whereabouts of said aliens;

5. What assistance, remuneration or other consideration was given said aliens, particularly in regard to their travel from the Northern District of Illinois if they are not now in custody;

6. What agreements, promises or understandings were made or given by said aliens or agents of the United States in regard to testimony that might be given by the former at the trial of this cause;

7. What information exists to support the belief that said aliens are now subject to the process of this Court, to extradition for purposes of testimony at the trial of this cause, or that their presence at trial otherwise can be assured.

The defendant further moves that copies of all documents pertinent to the above be produced with the government's answers.

The foregoing motion should be granted because of its bearing on the issues raised by the defendant's Motion to Dismiss the Indictment, and also because of the information that might be disclosed thereby as to the mootness of this cause. Should the essential government witnesses be unavailable, as seems likely, this information should be disclosed to the Supreme Court under its rule that the merits of a controversy may not be considered if the dispute has become moot. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944); *Mills v. Green*, 159 U.S. 651 (1895).

In the alternative, should the Court deny the foregoing motion, as well as the defendant's Motion to

Dismiss the Indictment, the defendant moves for an immediate trial for the reasons ~~set forth~~ in his Motion to Dismiss.

Respectfully submitted,

PASCUAL GUANA-SANCHEZ, Defendant

By:
His Attorney

THOMAS D. DECKER
Federal Defender Program
219 South Dearborn Street
Chicago, Illinois 60604
435-5580

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 72 CR 50 Date September 18, 1974

Title of Cause United States of America v. Pascual Guena-Sanchez

Brief Statement of Motion: Motion to Dismiss Indictment and Defendant's Motion for Discovery or, Alternatively, for Immediate Trial.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: Thomas D. Decker, Federal Defender Program

Representing: Pascual Guena-Sanchez

Names and Addresses of other counsel entitled to notice and names of parties they represent: James R. Thompson, USA

JBP

For reasons stated of record, it is ordered that the motion of the defendant to dismiss the indictment and defendants Motion for discovery or alternatively, for immediate trial be and the same hereby are denied.

Reserve space below for notations by minute clerk

A TRUE COPY ATTEST
H. STUART CUNNINGHAM, CLERK
BY
U.S. DISTRICT
NORTHERN DISTRICT OF ILLINOIS
DATED SEP 11 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.